Supreme Court, U. S.
FILED
DEC 6 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court Of The United States

No. 80-276
October Term, 1980

Westinghouse Electric Corporation,
Petitioner,

v.

Christine Vaughn and Marion Gee,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF

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TABLE OF CONTENTS

Page

ARGUMENT:

REPLY TO ADDITIONAL ARGUMENTS RAISED IN BRIEF IN OPPOSITION.

I. WAS THE CHARACTER OF THE OPPOSING EVIDENCE PRESENTED BY THE RESPONDENT TO ESTABLISH A PRIMA FACIE CASE SUFFICIENT ALSO TO OVERCOME DEFENDANT'S ARTICULATED NON-DISCRIMINATORY REASON FOR THE CONDUCT, ABSENT THE REQUIREMENT OF AN UNFAIR STANDARD OF PROOF? 1

II. DOES THE PETITIONER'S ASSERTION THAT THE DISTRICT AND CIRCUIT COURTS BASED THEIR DECISIONS UPON AN IMPROPER BURDEN OF PROOF BY REQUIRING OBJECTIVE CRITERIA AND A PREPONDERANCE OF EVIDENCE, "DISTORT THE RECORD AND MISCONSTRUE THE HOLDINGS OF THE COURT BELOW?" 5

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Board of Trustees v. Sweeney, 439 U.S. 24 (1978) ..... 9, Passim

Bolton v. Murray Envelope Corp., 493 F.2d 1919 (5th Cir. 1974) 2

Furnco Const. Corp. v. Waters, 438 U.S. 567 (1978) ..... 9, Passim

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) 3

Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979) 9

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) ..... 3, Passim

Narrine v. Western Electric Co., 507 F.2d 590 (8th Cir. 1974) 2

Times v. Board of Ed. of McNeil, Arkansas, 452 F.2d 551 (8th Cir. 1971) 2

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ARGUMENT

REPLY TO ADDITIONAL ARGUMENTS RAISED IN BRIEF IN OPPOSITION

I. WAS THE CHARACTER OF THE OPPOSING EVIDENCE PRESENTED BY THE RESPONDENT TO ESTABLISH A PRIMA FACIE CASE SUFFICIENT ALSO TO OVERCOME DEFENDANT'S ARTICULATED NON-DISCRIMINATORY REASON FOR

THE CONDUCT, ABSENT THE REQUIREMENT OF AN UNFAIR STANDARD OF PROOF?

In her brief in opposition, the respondent asserts that Westinghouse failed to demonstrate the legitimacy of its argiculated reason for her job disqualification in 1971 by a preponderance of the evidence. It is respondent's contention that her opposing evidence was sufficiently strong to overcome entirely the proof offered by the petitioner as to the reason for her job disqualification. In order to establish a prima facie case, the respondent relied upon statistics that showed that discharges were in higher percentages than the overall proportion of blacks in defendant's work force, and that hiring resulted in a black employee representation that although in excess of their representation in the surrounding labor force, was lower than the percentage of blacks who had applied for employment during a given period. From those statistics, the trial court drew an inference that, even though no statistics were presented as to job disqualifications, a prima facie case could be inferred as to disqualifications as well. The court then held that the employer's evidence, consisting of both written and testimonial evidence of warnings to the employee, and testimony by her supervisor indicating that her error rate was consistently higher than that of other employees, was not sufficient to rebut the plaintiff's assertions to the contrary.

Respondent makes much of the statistical evidence presented in the trial court. Courts have distinguished between the value of statistics in individual—as opposed to class—complaints. *Times v. Board of Ed. of McNeil, Arkansas*, 452 F.2d 551 (8th Cir. 1971). *Bolton v. Murray Envelope Corp.*, 493 F.2d 191 (5th Cir. 1974); *Narraine v. Western Electric Co.*, 507 F.2d 590 (8th Cir. 1974). The

application of statistics becomes even more difficult in discipline or discharge cases, where the act or conduct complained of is individualized and personal. In this case the District Court accepted statistical data not only to establish a prima facie case, but also applied to same evidence to determine that the reasons articulated by the petitioner on job disqualification were pretextual. If such a test were to prevail, then Title VII plaintiffs would succeed in disparate treatment cases based upon statistics alone. This result overlooks the important distinction between disportionate impact and disparate treatment cases defined by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805 (1973). In that case, the Court held that "statistics as to petitioner's employment policy and practice may be helpful . . . " but cautioned that "such general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to rehire." *Id.* In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), at 340, this Court stated that "[s]tatistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted." An employer required to meet the burden imposed by the trial court in the instant case could never terminate or discipline a substandard minority employee, as long as the statistics concerning his overall work force were not on par with the minority representation in the surrounding community or his applicant flow data deviated from hiring data.

Had the trial court allocated the burdens properly between the parties, the disqualification issue would have been resolved as follows:

(1) Is poor production a "legitimate, non-discriminatory reason" for a disqualification (not a

discharge) from a particular position? Obviously it is, for production is clearly a business-related and necessary element of job performance in private industry. In *McDonnell Douglas, supra*, at 802-03, this Court held that the articulation burden was met by asserting a "reasonable basis for refusal to hire."

(2) If the reason offered by the employer is "legitimate" has the employer in this case "shown", "proved", or "articulated" such a reason? As the district court and the court of appeals both found, "Vaughn 'unquestionably had problems with production . . . .'" (Appendix B to Petition for Certiorari, p. 15 [hereinafter "Pet. App."]. Thus, Westinghouse must have adduced some convincing evidence of poor production. In fact, that evidence was enough to move the reviewing court to admit that "[i]n viewing the evidence we might be of the opinion that Westinghouse articulated a legitimate reason for Vaughn's disqualification . . . ." (Pet. App. B-16, 17.) In *McDonnell Douglas*, the Court found that the petitioner had "assigned respondent's participation in unlawful conduct against it as the cause for his rejection." *Id.* at 803. That, said the Court, "suffices to discharge petitioner's burden of proof at this stage and to meet respondent's prima facie case of discrimination. *Id.*

(3) If the reason is "articulated" by the employer and found to be "legitimate" (that is, if the reason exists in fact, and is sufficient to support a disciplinary action) has the plaintiff overcome those proffered reasons by showing them to be pretextual? The court of appeals held, "Vaughn was not required to show that the reasons were pretextual." (Pet. App. B-17.)

Petitioner submits that in a proper allocation of burdens, the plaintiff will allege through statistics and other

evidence that discrimination exists. Defendant will then rebut with more specific reasons as to the particular incident alleged to be discriminatory. The plaintiff will then show if he can that those reasons are pretextual. He may do this by showing that whites are treated differently than blacks in the same or similar circumstances (*McDonnell Douglas, supra*, at 804) or by relying on more specific statistics which show that when the employer was faced with the same employment decision in the past, blacks were disparately treated and therefore the "reasons" in the instant case which are non-discriminatory on their face are, when viewed in this light, merely pretext. No showings of this nature have been made by the respondent in the instant case.

II. DOES THE PETITIONER'S ASSERTION THAT THE DISTRICT AND CIRCUIT COURTS BASED THEIR DECISIONS UPON AN IMPROPER BURDEN OF PROOF BY REQUIRING OBJECTIVE CRITERIA AND A PREPONDERANCE OF EVIDENCE, "DISTORT THE RECORD AND MISCONSTRUE THE HOLDINGS OF THE COURT BELOW?"

The answer to this question is a simple "no." A review of the language of both courts will support that answer. Contrary to respondent's assertions, the petitioner does not rely merely on isolated language taken out of context to the main thrust of the decision. Rather, the holdings of both courts suggest that the lack of rebuttal evidence in the form of objective production criteria was central to the decisions. For example, respondent places heavy reliance on the strong opposing evidence, yet, except for the testimony of Ms. Vaughn, there was no other evidence that went specifically to the issue of disqualification. The issue before this Court is

not whether the trial court resolved that basic credibility determination improperly against the petitioner. The issue is rather whether, lying beneath that resolution, and establishing a clear pattern throughout both opinions in the lower courts, there were improper requirements placed on petitioner to either (1) disprove any discriminatory motive or (2) prove legitimate reasons by a preponderance of the evidence, using objective criteria.

In the original Order by the district court, it was held that "[t]he Court is not persuaded that the defendant has borne its burden of proving that this disqualification was not motivated in substantial part by racial reasons." (Pet. App. A-28.) If that test was applied, as petitioner believes it was, then the unfairness to petitioner of improperly imposing such a burden was hardly cured by the court's subsequent Order suggesting that the test was actually one of "simply fail[ing] to articulate a legitimate non-discriminatory reason for Ms. Vaughn's disqualification." (Pet. App. A-41) The "definite and firm conviction" still remains that the court relied on an improper standard during the trial. There was evidence, apparently credible to the trial court, that Ms. Vaughn had difficulty with absenteeism, "but not so great as to warrant dismissal." (Pet. App. A-29.) There was also evidence that she had experienced poor production. It should be pointed out that Ms. Vaughn was never terminated but only disqualified from holding one type of job in petitioner's plant in 1971. In fact, the district court pointed out that "[t]he prima facie case made here does not relate specifically to disqualifications of employees . . . ." (Pet. App. A-28.) Nevertheless, the court remained unconvinced because "the *absence of objective production criteria* makes it difficult for the court to hold that these problems were serious enough to meet the burden imposed on the defendant by

law." (Pet. App. A-29, 30.) The petitioner would assert that the court must have been referring to the burden imposed only sentences before, and previously quoted *supra*. (Pet. App. A-28.) The burden allocated to the parties becomes extremely important when considered in light of the almost total lack of opposing evidence concerning production, either by Ms. Vaughn or by other white employees. If "articulation" is the standard, a defendant need not assume the burden of producing evidence that the plaintiff's error rate was no greater than other white employees who were not disqualified, because the plaintiff has not met its burden of producing evidence on that issue.

Nor was the attempt by the trial court to impose its own standard of "objective" employee evaluation a mere isolated reference. The court continues its discussion of such objective factors by stating that "[a]pparently defendant's supervisors had numerical standards to judge performance, but these standards were not communicated to the employees and were not revealed to the court in testimony." (Pet. App. A-30.) Again, in its suggestions for submission to the court on the relief issues, the trial court asked whether the company should "be required to institute objective performance criteria by which [Ms. Vaughn's] fitness to retain the job can be assessed?" (Pet. App. A-31.) In the Supplemental Findings of Fact and Conclusions of Law (Pet. App. A-33 [11].), the trial court suggested that the defendant "could perhaps avoid some legal difficulties in the future if it adopted such criteria for evaluation of employeees," (referring to its own "objective" standards) but resolves the difficulty of developing such criteria by saying that the court should not involve itself in management decisions of this nature. (*Id.*) Finally, the court states that it is "not persuaded that the imposition of such a

requirement is necessary to vindicate the statute." (*Id.*) If such objective criteria are not necessary to remedy violations of the statute, how can they become the basis for an employer's liability under Title VII?

The court of appeals was no less dependent upon objective criteria in its resolution of the issues upon review. First imposing the burden of rebuttal by a preponderance of the evidence rather than merely adducing evidence, the court discusses how the employer might meet such a rebuttal burden. The court reviewed the conflicting testimony between the supervisor and the employee, and then stated that, even considering that testimony, "the company had not articulated objective standards indicating what satisfactory production levels were." (Pet. App. B-15.) The court even quoted the district court's language, quoted *supra*, on the absence of objective production criteria. (Pet. App. B-15, 16, quoting Dist. Ct., Pet. App. A-29.). The court of appeals next held, as set out separately by respondent (Brief in Opposition at 9 [hereinafter "Brief Opp."]) that "given the opposing evidence concerning production *and the absence of objective production criteria*, Westinghouse failed to demonstrate the legitimacy of its articulated reason by a preponderance." (Pet. App. B-16.) (Emphasis added.) Petitioner asserts that the court used the term *and*, not *or*, and therefore considered the lack of objective criteria as an essential, if not the primary basis for upholding the trial court. If viewed as it must be by a defendant seeking to rebut a prima facie case of discrimination, this language by the court of appeals can mean only that, while the defendant need not prove its reason for the challenged conduct is non-discriminatory (as this would be violative of *Sweeney*), he must prove that the reason articulated is legitimate, and must do so by a preponderance of the evidence, even though the plaintiff has not yet presented any evidence of its illegitimacy. The result is obvious—the defendant is still required to rebut the pretext before it is presented. He must still

prove that his reasons were non-discriminatory in order to succeed.

Petitioner is at a loss to understand how the respondent can assert that *Furnco Const. Corp. v. Waters*, 438 U.S. 567 (1978) or *Board of Trustees v. Sweeney*, 439 U.S. 24 (1978) stand for the proposition that the defendant must rebut the prima facie case by a "preponderance." The dissent in *Sweeney* indicates that "adducing evidence that explains what he had done" satisfies the defendant's burden. Any evidence therefore, is enough to meet the requirement of adducing evidence. "Adducing" certainly does not require proof by a preponderance. Respondent misleads this Court by asserting that the trial court rejected certain "incredible" evidence. The district court merely weighed apparently credible (*c.f.* Pet. App. A-29.) evidence on both sides and held that the quantum of evidence was not enough to meet the preponderance burden. No such burden exists, and no decision of this Court has ever suggested that it did.

Respondent's reliance on *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979) is illustrative of the misunderstanding of burdens of proof inherent in respondent's argument. The quoted language in *Loeb* that the evidence must be sufficient to rebut or dispel the inference does not address the measure of proof required to accomplish that rebuttal. That measure is set by *McDonnell Douglas*, *Furnco*, and *Sweeney*. In fact, the *Loeb* court went on to say that "the more idiosyncratic or questionable the employer's reason, *the easier it will be to expose it as a pretext*." 600 F.2d at 1012n.5. (Emphasis added.) The court obviously believed that the defendant's burden was to produce a reason, and the plaintiff's burden, in order to prove that reason to be pretextual, would be eased—not *erased*—if defendant's proffered reason was not a legitimate one. Thus, if as respondent points out (Brief Opp. p. 20) "the asserted reason for a discharge is that

the employee abused the sick leave policy . . . , the court may properly expect to receive evidence as to whether other employees were similarly treated for similar abuses." But in that statement lies the misunderstanding by the respondent. The burden of producing such evidence lies with the plaintiff, not the defendant. A contrary result is precisely what this Court sought to avoid in *Sweeney.*

CONCLUSION

Whether or not the district court's decision was an erroneous factual resolution after all the facts are considered can only be determined after a retrial in which the plaintiff is required to present evidence going to the issue of pretext, under the correct legal standard that the defendant, by articulating a legitimate non-discriminatory reason, without being required to prove its reason by objective criteria, has successfully rebutted the prima facie case. Then, if the defendant is unable to rebut the additional pretextual evidence, the plaintiff will ultimately prevail. To date, no pretextual evidence has been presented, because the district court's erroneous resolution of the legal issues effectively circumvented that step. In so doing, the decision of the trial court, and the subsequent decision of the circuit court, were clearly erroneous, and require reversal.

Respectfully submitted,

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